INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JIMMY A. ORTIZ,

Complainant,

VS.

DEPARTMENT OF REVENUE, MOTOR VEHICLE DIVISION, DRIVER LICENSE SECTION,

Respondent.

Administrative Law Judge Mary S. McClatchey heard this case on January 16, 2003. Assistant Attorney General Hollyce Farrell represented Respondent Department of Revenue ("DOR"). Jimmy Ortiz appeared and represented himself.

MATTER APPEALED

Jimmy Ortiz ("Complainant") appeals his disciplinary reduction in pay. For the reasons set forth herein, Respondent's action is affirmed.

ISSUES

- 1. Whether Complainant committed the acts for which he was disciplined;
- 2. Whether Respondent's action was arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

- 1. Complainant is a Driver License Examiner ("DLE") I in DOR's Motor Vehicle Division, Driver License Section.
- 2. Complainant was responsible for issuing driver licenses and identification ("ID") cards (both of which are referred to herein as "state documents").
- 3. Identity theft has become an enormous problem in Colorado. Issuance of accurate state documents is essential to avoid fraudulent misuse of these valuable documents. Complainant

was responsible for the integrity of all state documents that he issued.

- 4. In response to the problems with fraud and identity theft, the Motor Vehicle Business Group formed a task force with representatives of the banking, retail, and business communities. In the year 2000, DOR installed new equipment for use by DLE's in issuing state documents. This computer equipment enabled DLE's to compare a photographic image of the individual applying for a state document with the individual actually standing in front of him or her. If no such photo image were on file, then a series of procedures for utilizing written documents to verify identity and information were followed.
- 5. In addition, on June 6, 2002, DOR instituted the ID List policy. Circulated via memorandum, signed by Complainant, the policy mandated that DLE's use only those documents specified on the "ID List" as a basis for issuing state documents. The policy further mandated that only managers can approve the use of documents not on the ID List, and that such managerial approval must be in writing. The memo stated in part, "ID LIST: Managers *only* can make exceptions to the ID list." (Emphasis in original.)

July 2002 Corrective Action

6. On July 15, 2002, Complainant captured the wrong photographic image of a customer, and the customer left the building with the incorrect state document. On July 22, 2002, Respondent issued him a corrective action which stated in part,

"This corrective action is due to the incorrect image of a customer you were servicing on July 15, 2002. Our new image capture system provides the file photo of the driver for the examiner to view in order to ensure that the person pictured is the applicant standing before the driver license employee. If the image is NOT available on the imaging screen, it is then that the secondary process of comparing signatures will fall into place. These procedures have been thoroughly explained to all driver license staff, along with the importance of issuing correct documents. There is no excuse for capturing a license with the wrong photo or incorrect information, and staff members have been warned that disciplinary action could result from such a careless error.

"The importance of capturing the correct image and accurate demographic information on any driver license and/or ID card is underscored by the fact that a statewide task force was created to discuss this problem of document fraud. Fraudulent documents have proven to be expensive to public and private organizations. I conclude that your action on that day falls short of the standards for customer service. You have failed to competently perform an essential part of your job."

7. The corrective action remained in effect through January 15, 2003, and warned Complainant that any additional failure to follow proper procedure in the issuance of state documents could subject him to further disciplinary action up to and including dismissal.

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8. Complainant did not grieve the July 2002 corrective action.

October 2002 Corrective Action

- 9. On June 24, 2002, Complainant and his supervisor were both involved in capturing the wrong image of a customer. They failed to verify the image on the computer matched that of the individual in front of them. The individual left the office with a fraudulent ID card, and was later apprehended when attempting to make a duplicate ID card at another Motor Vehicle office
- 10. On October 4, 2002, Respondent issued Complainant a corrective action for this incident. He did not grieve it. Respondent also issued a disciplinary action to the supervisor.

November 2002 Disciplinary Action

- 11. On October 17, 2002, Complainant violated the ID List policy by accepting a document not on the ID List as a basis for issuing a Colorado ID card. He did this without managerial approval. The ID card issued by Complainant was found to be fraudulent by using the facial recognition system on the computer.
- 12. Roni White, Field Operations Manager, Driver License Section, scheduled a pre-disciplinary R-6-10 meeting with Complainant. He attended the meeting without representation. At the meeting, Complainant informed White that he had been told by his immediate supervisors to use "exception processing" (accept documents not on the ID List) without managerial approval. White interviewed two of Complainant's co-workers, who stated that this claim was not true.
- 13. White considered terminating Complainant because of his pattern of carelessly violating department policy. However, in mitigation, White viewed Complainant generally as a good employee.
- 14. On November 4, 2002, White imposed a two-week pay reduction, in the amount of \$988.12, to be deducted in increments of \$247.03 over four months, January through April 2003.
- 15. Complainant testified at hearing that White did not interview his co-workers regarding the managerial directive to do "exception processing." This testimony is rejected as having little weight, since White presented as a very credible witness with no bias against Complainant.

DISCUSSION

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I. Standard of Proof.

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. art. 12, §§ 13-15; § 24-50-101, et seq., C.R.S.; Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct or violation of the State Personnel Board rules or the rules of the agency of employment;
- (3) willful failure to perform or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Kinchen*, *supra*. The Board may reverse Respondent's decision only if the action is found arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. Complainant committed the acts for which he was disciplined.

Complainant committed the acts for which he was disciplined. At hearing, he did not deny having engaged in the conduct upon which discipline was based. In fact, the only evidence he offered was his own extremely brief testimony concerning whether or not White interviewed his coworkers. That testimony was rejected at Finding of Fact #15 above.

III. Respondent's action was not arbitrary, capricious or contrary to rule or law.

In Colorado, arbitrary and capricious agency action is defined as:

(a) neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

Lawley v. Dep't of Higher Education, 36 P.3d 1239, 1252 (Colo. 2001), citing Van DeVegt v. Board of County Commissioners of Larimer County, 55 P.2d 703, 705 (Colo. 1936).

Complainant argues only that Respondent failed to adequately investigate his claim that his supervisors told him to bypass the ID List without managerial approval. This argument has been rejected.

Complainant violated clear procedures for issuing accurate state documents on three occasions in 2003B054 4

a period of a few months. Respondent issued two corrective actions prior to finally taking disciplinary action. The seriousness of Complainant's October 2002 violation was such that it could easily have supported more harsh disciplinary action. However, Complainant's appointing authority values him as an employee, and chose to take a relatively mild disciplinary action in response to his serious conduct. Respondent's action was reasonable under the circumstances.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

INITIAL DECISION

For the reasons set forth above, Respondent's action is <u>affirmed</u>. Complainant's appeal is <u>dismissed with prejudice</u>.

DATED this _____ day of February, 2003, at Denver, Colorado.

Mary S. McClatchey Administrative Law Judge 1120 Lincoln St., Suite 1420 Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657

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PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-#2136.

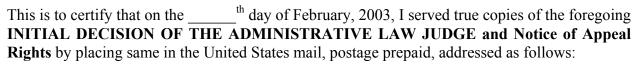
BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE



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Jimmy Ortiz 4345 Quivas Denver, Colorado 80211

and by courier pickup to:

Hollyce Farrell Assistant Attorney General Employment Law Section 1525 Sherman, 5TH Floor Denver, CO 80203